Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)–26 OF 2008(S)
AUGUSTINE PAUL, HASHIM YUSOFF AND MOHD GHAZALI FCJJ
11 SEPTEMBER 2009

Civil Procedure — Appeal — Appeal to Federal Court — Framing of questions — Whether questions which do not affect outcome of appeal will not be answered — Whether vague and incomplete questions will not be answered — Whether questions must be drafted with extreme care — Courts of Judicature Act 1964 s 96(a)

A timber licence was issued entitling the appellant to fell, convert and extract timber from a piece of alienated land. The appellant and respondent entered into certain timber extraction agreements whereby the appellant allowed the respondent to extract commercial timber logs from a part of the said land. The appellant appointed the respondent as its attorney to manage and superintend the extraction and sale of timber and to enter into contracts and arrangements of all kinds in respect of the agreements. Subsequently the appellant notified the respondent that it had been informed by the forestry department that the agreements entered into by them had contravened s 24(6) of the Forest Enactment 1968 ('Enactment') and, accordingly, it regarded itself as being discharged from performance of the agreements. The respondent filed an action in the High Court against the appellant for breach of contract. The action was dismissed and the Court of Appeal allowed the respondent's appeal. The appellant obtained leave to appeal to the Federal Court on six questions. Question No 1 was 'Whether a timber licence which was stated on the document as being issued by the appropriate authority under s 24 of the Enactment ceases to be one because of non-compliance with the format of licence prescribed in the Forest Rules 1969?'

Held, dismissing the appeal with costs:

(1) Parties must exercise extreme care and caution in drafting questions for appeal under s 96(a) of the Courts of Judicature Act 1964. If the questions do not have the effect of affecting the outcome of the appeal, the Federal Court may decline to answer them (see paras 8–9).

(2) Question No 1 was vague and incomplete as it did not identify the specific aspect of non-compliance with the format of licences in order to render it worthy of consideration. It was only with the necessary particulars could there be an effective analysis of the effect of non-compliance with the forms in order to determine whether the licence had become invalidated (see para 14).

(3) Since none of the six questions posed could be answered, the appeal had to be dismissed without a consideration of its merits (see para 15).

[Bahasa Malaysia summary

Suatu lesen pembalakan dikeluarkan yang memberi hak kepada perayu untuk menebang, mengkonversi dan mengekstrak kayu balak daripada sebidang tanah yang telah diberi milik. Perayu dan responden menandatangani suatu perjanjian mengesktrak kayu balak di mana perayu membenarkan responden mengekstrak kayu balak komersial daripada sebahagian tanah tersebut. Perayu melantik responden sebagai wakilnya untuk mengurus dan mengawasi penjualan kayu balak dan menandatangani sebarang kontrak dan pelbagai urusan berikutan dengan perjanjian-perjanjian tersebut. Kemudiannya perayu memaklumi responden bahawa perayu telah diberitahu oleh Jabatan Perhutanan bahawa perjanjian-perjanjian yang telah ditandatangani tersebut menyalahi s 24(6) Enakmen Hutan 1968 ('Enakmen') dan, seterusnya perayu menganggap bahawa perayu tidak lagi perlu melaksanakan perjanjian-perjanjian tersebut. Responden memfailkan suatu tindakan di Mahkamah Tinggi terhadap perayu atas kemungkiran kontrak. Tindakan tersebut telah ditolak dan Mahkamah Rayuan membenarkan rayuan responden. Perayu telah mendapat keizinan untuk merayu ke Mahkamah Persekutuan atas enam persoalan. Soalan pertama ialah sama ada suatu lesen pembalakan yang dinyatakan telah dikeluarkan oleh pihak yang berkewajipan di bawah s 24 Enakmen tidak lagi sah disebabkan oleh ketidakpatuhan kepada format lesen seperti yang diperuntukkan dalam Peraturan-Peraturan Hutan 1969.

Diputuskan, menolak rayuan dengan kos:

(1) Pihak-pihak mestilah amat berhati-hati dan berwaspada dalam mendraf persoalan-persoalan di bawah s 96(a) Akta Mahkamah Kehakiman 1964. Jika persoalan-persoalan tersebut tidak memberi kesan terhadap keputusan rayuan tersebut, Mahkamah Persekutuan tidak perlu menjawabnya (lihat perenggan 8–9).

(2) Persoalan pertama adalah tidak jelas dan tidak lengkap kerana persoalan tersebut tidak mengenalpasti aspek khusus ketidakpatuhan kepada format lesen-lesen tersebut bagi menjadikannya perlu dipertimbangkan.

Hanya dengan butiran yang perlu yang membolehkan analisa yang berkesan ke atas akibat ketidakpatuhan kepada borang-borang tersebut bagi menentukan sama ada lesen tersebut menjadi tidak sah (lihat perenggan 14).

(3) Memandangkan tidak satu pun daripada enam persoalan yang dikemukakan boleh dijawab, rayuan ini harus ditolak tanpa perlu mempertimbangkan di atas meritnya (lihat perenggan 15).]

Notes

For cases on appeal to Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 749–756.

Cases referred to

Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621, FC (refd)
Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (refd)
Loknath Padhan v Birendra Kumar Sahu AIR 1974 SC 505 (refd)
Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp [1995] 1 MLJ 401, FC (refd)
Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Forest Enactment 1968 ss 15, 16, 24, 24(6)
Forest Rules 1969 r 3
Interpretation Acts 1948 and 1967 s 71

Appeal from: Civil Appeal No S-02–261 of 2007 (Court of Appeal, Kota Kinabalu)

Cyrus Das (Norbert Yapp, Celestina Stuel Galid with him) (Jayasuriya Kah & Co) for the appellant.
Alvin John (Marina Tiu with him) (Yap Chin & Tiu) for the respondent.

Augustine Paul FCJ:

[1] This appeal raises for consideration yet again the significance of the proper manner of framing questions for argument in the Federal Court pursuant to s 96(a) of the Courts of Judicature Act 1964 ('s 96(a)').

[2] In this case, a timber licence was issued and entered into by and with agreement between the director of forestry for and on behalf of the

Government of the State of Sabah and Sabah Forest Industries Sdn Bhd (the appellant before us) from 16 October 1990 till 15 October 1995 to fell, convert and extract timber from a piece of alienated land covering an area of about 258,584 hectares of timber land. By two agreements dated 28 June 1993 and 13 August 1993, the appellant allowed UNP Plywood Sdn Bhd ('the respondent before us') to extract commercial timber logs from a total area of 11,302 hectares of land. By two powers of attorney dated 4 August 1993 and 22 September 1993, the appellant appointed the respondent as its attorney to, inter alia, manage and superintend the extraction and sale of timber and to enter into contracts and arrangements of all kinds in respect of the two agreements. By letter dated 22 August 1994 the appellant notified the respondent that it had been informed by the Forestry Department that the two agreements entered into by them had contravened s 24(6) of the Forest Enactment 1968 ('s 24(6)') and, accordingly, it had regarded itself as being discharged from performance of the two agreements. Section 24(6) reads as follows:

> A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provision of any written law.

[3] The respondent filed an action in the High Court against the appellant for breach of contract. It was dismissed by the High Court on the ground that the two agreements entered into by them were illegal and void as it amounted to an assignment of the appellant's licence to the respondent as it was prohibited by law.

[4] The respondent appealed to the Court of Appeal. In ruling that the licence in this case does not come within s 24 of the Forest Enactment 1968 ('s 24') Gopal Sri Ram JCA (as he then was) said:

> The respondent's case is that the licence in question was issued under s 24 of the Forest Enactment 1968. For this contention the respondent relied on the following endorsement at the foot of the timber licence (see at p 337 of Vol 2 of the record of appeal) as follows:
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> > In Witness Hereof, the Director for and on behalf of the Government of the State of Sabah and empowered by Section 4 and 24 of the Forest enactment, 1968 has hereunder set his hand on this 26th day of Oct 1990.
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> Under r 3 of the Forest Rules 1969, a licence issued under s 24 must be in Form 1, Form IIA or Form IIB. The licence here is not in any of the said prescribed forms. It is not correct to construe the timber licence as a s 24 licence just because the director says it is signed or issued under s 24. We are therefore unable to agree with this contention of the respondent.

[5] It was also held that the two agreements in this case did not amount to an assignment. As Gopal Sri Ram JCA (as he then was) said:

> We return now to the issue of assignment. The impugned agreements make it clear that only 4.3% of the whole area covered by the licence issued to the respondent was made the subject matter of the agreements. Further, cll 2 and 6 of the agreement dated 28 June 1993 make it clear that the respondent retains control over the felling of the timber. As far as the power of attorney is concerned, this was executed simultaneously with the agreements and is merely an adjunct to enable the appellant to extract timber.
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> Learned counsel for the respondent has submitted that the facts of the present case are indistinguishable from those of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200. With respect, we do not agree. In both those cases, the whole of the rights under the licence were assigned to the other party. Here the agreements do not do that. They merely confer on the appellant the right to enter, extract and account for the timber to the respondent. Of course, the appellant has a share in the profits but that does not mean that there was an assignment of the licence.
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> In our judgment, the facts of this case are closer to those of *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401 …
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> So too here. We find that the agreements in the present instance do not amount to an assignment. In any event we would add that the licence issued to the respondent by the state does not prohibit assignment in any of its clauses. It is also pertinent to note that cl 19 of the licence held by the respondent provides for an arbitration between itself and the government in the event of any dispute. It is most unlikely to find such a provision in a licence. Arbitration clauses are normally found in contracts or agreements. Hence there is much force in the appellant's contention that the licence was a licence agreement under s 15 and not a licence issued under s 24 of the Enactment.

[6] In elaborating further as to why the licence is one issued under s 15 of the Forest Enactment 1968 ('s 15') Gopal Sri Ram JCA (as he then was) said:

> Now, s 15 of the Enactment provides as follows:
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> (1) Save as otherwise provided in this Enactment and notwithstanding the provision of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the approval of the cabinet or of a licence.
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> (1A) A licence agreement entered into by the Minister under subsection (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.

(2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provision of such licence agreement shall be deemed to be compliance with the provisions of this Enactment.

It is to be noted that s 15 speaks of a licence agreement and not of a mere licence. And if you examine the licence issued to the respondent in the instant case, you will find that it is in the form of an agreement. Hence, the arbitration clause to which we have already referred. Further, it is of importance to note that s 15 in the second limb of its second subsection specifically provides that a licence agreement is not to be treated as being inconsistent with the Enactment though its provisions conflict with those of the latter. In other words, a licence agreement may contain terms that are inconsistent with the provisions of the Enactment and yet remain valid. This clearly points to the superior status that the Enactment confers upon a licence agreement issued under s 15.

[7] The Court of Appeal allowed the appeal by the respondent. The appellant was given leave to appeal to the Federal Court on the following questions:

Question No 1

Whether a timber licence which is stated on the document as being issued by the appropriate authority under s 24 of the Forest Enactment 1968 ceases to be one because of non-compliance with the format of licence prescribed in the Forest Rules 1969?

Question No 2

Whether the Court of Appeal was correct in law in classifying the impugned licence as a s 15 licence under the Forest Enactment when the said licence was issued by the director of forestry whereas a s 15 licence could only be issued by the Chief Minister?

Question No 3

Taking into account the express prohibition against transfer of rights or privileges provided in s 16 of the Forest Enactment 1968 and assuming that the timber licence is a s 15 licence, whether the Court of Appeal was correct in law in holding that a s 15 licence can be freely assigned if the express terms of the licence does not prohibit assignment in any of its clauses?

Question No 4

Whether the Court of Appeal was correct in applying the test or marker used in *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp* [1995] 1 MLJ 401 to determine non-assignability or non-transferability of a timber licence under the Sabah Forest Enactment when the case did not turn on the interpretation of s 24(6) or any other provision of the said Enactment?

Question No 5

Whether the Court of Appeal acted correctly in law in omitting to follow the established tests to determine conduct amounting to the transfer or assignment of a timber licence, which is prohibited under s 24(6) of the Forest Enactment as laid down by the former Federal Court in the early cases of *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 and their progeny?

Question No 6

Whether as a matter of law, there is any difference to the application of s 24(6) of the Sabah Forest Enactment if the subject matter consists of only a portion of the licence area?

[8] Before proceeding any further it is perhaps apposite to observe that parties must exercise extreme care and caution in drafting questions for appeal under s 96(a). As made clear by this court in *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 at pp 632–633:

The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a prima facie case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the affect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a prima facie case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469.

[9] If the questions do not have the effect of affecting the outcome of the appeal this court may decline to answer them. In this regard reference may be made to *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621 where this court said at pp 633–634:

> The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469, Viscount Simon LC said at p 470:
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> > I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing is between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

[10] In *Loknath Padhan v Birendra Kumar Sahu* AIR 1974 SC 505, Bhagwati J said at p 508:

> If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the court to engage itself in deciding it. … It would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

Thus this court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225; *Raphael Pura v Insas Bhd v Anor* [2003] 1 MLJ 513; *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 and *Tan Heng Chew & Ors v Tan Kim Hor & Ors* [2006] 5 MLJ 313.

[11] It is now necessary to consider the scope of the six questions that have been posed. Question Nos 1, 4, 5 and 6 are in relation to s 24 while question Nos 2 and 3 are in relation to s 15. It must immediately be observed that Question No 3 is not relevant as it relates to a transfer of rights or privileges in a forest reserve while the land in this case is alienated land. Question No 2 is also not relevant as a declaration of the licence as one issued under s 24 will automatically nullify the finding of the Court of Appeal that the licence is one that is issued under s 15. Furthermore, any answer to the question in the absence of such a declaration will have no bearing on the outcome of the appeal in favour of the appellant. Question Nos 1, 4, 5 and 6 must be viewed against the background of the finding of the Court of Appeal that the licence is not one that is issued under s 24. The answers to the questions must therefore have the effect of reversing this finding to enable the appellant to succeed in the appeal. Question Nos 4, 5 and 6 are premised on the basis that the licence is one that is issued under s 24. If the licence is one that was not so issued they will have no bearing on the outcome of the appeal. Thus any answer given to the questions will be academic and will become relevant only if it is first established that the licence does in fact come within s 24. The only remaining question to be considered as to whether it has this effect is Question No 1. It reads as follows:

> Whether a timber licence which is stated on the document as being issued by the appropriate authority under s 24 of the Forest Enactment 1968 ceases to be one because of non-compliance with the format of licence prescribed in the Forest Rules 1969?

[12] In order to appreciate this question reference must be made to r 3 of the Forest Rules 1969 which reads as follows:

> Licences for the purposes of s 24 shall be in Form I, Form IIA or Form IIB as set out in Schedule III.

[13] This provision must be read with s 71 of the Interpretation Acts 1948 and 1967 which reads as follows:

Save as is otherwise expressly provided, whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them.

[14] There can therefore be no doubt that only slight deviations from the prescribed forms within the meaning of s 71 will not invalidate them. But it must be reiterated that where the non-compliance is substantial the licence will become invalidated. It is therefore absolutely necessary to consider the precise nature of non-compliance with the forms in order to determine its effect. However Question No 1 is vague and incomplete as it does not identify the specific aspect of non-compliance with the format of licences in order to render it worthy of consideration. It is only with the necessary particulars can there be an effective analysis of the effect of non-compliance with the forms in order to determine whether the licence has become invalidated. It is therefore not possible to go any further in order to make an attempt to answer the question as the particular aspect of non-compliance with the format of licences has not been identified. It follows that question Nos 4, 5 and 6 cease to be of any relevance. They need not be answered.

[15] The corollary is that none of the six questions that have been posed can be answered with the result that the appeal must be dismissed without a consideration of its merits.

[16] My learned brothers Hashim Yusoff FCJ and Mohd Ghazali Mohd Yusof FCJ have read this judgment and have expressed full agreement with it. In the upshot the appeal is dismissed with costs. The deposit is to be paid to the respondent on account of the taxed costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum